United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL
WITH PROOF
OF SERVICE

76-7318

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

In the Matter of the Petition for Arbitration

Between

FAIR WIND MARITIME CORPORATION, as Owners of the S. S. "ISABENA",

Petitioner-Appellee,

and

TRANSWORLD MARITIME CORPORATION, as Charterer,

Respondent-Appellant.

ON APPEAL FROM A FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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and

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Respondent-Appellant

BRIEF FOR APPELLANT

Statement of the Issues

1. Does the United States District Court have jurisdiction to adjudicate a claim that arbitrators lack the requisite qualifications prior to arbitration and to remove an arbitrator whom it holds to be disqualified?

2. Will appellant be deprived of its basic rights to impartial adjudication and due process in arbitration if it is denied a hearing on the Panel's qualifications before being required to submit to the "jurisdiction" of the arbitration Panel?

3. Has appellant waived its right to challenge the presently-constituted panel or arbitrators as unqualified?

Statement of the Case

This is an appeal from the endorsement Order entered on June 16, 1976, in the United States District Court for the Southern District of New York by the Honorable Lawrence W. Pierce (86a). In that Order the Court granted motion of Fair Wind Maritime Corporation (Fair Wind) to compel Transworld Maritime Corporation (Transworld) to proceed to arbitration and denied Transworld's crossmotion to disqualify and remove the presently constituted Arbitration Panel.

Facts

Appellant Transworld chartered on time charter basis the S. S. "ISABENA" from appellee Fair Wind. The charter was on a modified Produce Exchange form. The purpose of the charter was to lighten a larger vessel to permit it to enter the harbor at Karachi, Pakistan.

After all of the grain to be removed from the larger vessel was on board the "ISABENA", it docked for several days in the port. It later left its berth and anchored in the outer harbor of Karachi without first discharging its grain cargo. While at anchor, the "ISABENA" capsized and sank with loss of the vessel, the master and four crew members and the cargo.

On June 7, 1973, appellee Fair Wind and "ISABENA"'s owners demanded arbitration to adjudicate its claim for the loss of the vessel. Appellant Transworld, as charterer, opposed arbitration on the ground there was no arbitrable issue. This

contention was predicated upon appellant's claim that the charter provisions expressly exonerated it from all liability for the loss. Consequently, there was no dispute for arbitration. Appellant refused to appoint an arbitrator or to participate in the arbitration.

Fair Wind then filed a petition pursuant to the Arbitration Act to compel arbitration and for the Court to appoint an arbitrator for appellant. Fair Wind had, in the meantime, appointed Mr. Lloyd Nelson as its arbitrator.

The District Court (Sourthern District of New York) granted the petition and appointed Professor Joseph Sweeney as the arbitrator for Transworld. This Order was affirmed by the Court of Appeals for the Second Circuit on May 16, 1974. Nelson and Sweeney in turn chose Harry G. Webber as the third member of the Panel and as its chairmen.

No action was taken thereafter until mid 1975, when Mr. Webber wrote Fair Wind asking if there was an intention to proceed with the arbitration. The first hearing before the Panel was scheduled for December 8, 1975.

Without waiving its position that the Panel was not properly qualified, Transworld sought to have the panel decide its preliminary argument that it was exonerated from all liability. After much discussion and some confusion, the Panel did call for briefs on the point and later rendered a decision adverse to Transworld.

Transworld's request for a statement of the Panel's reasons for its decision was denied. Following this action, Transworld made formal challenges to the arbitrator's qualifications.

The challenges were as follows:

(a) Professor Sweeney, the Court's appointee, may not be a "commercial man" within the meaning of the arbitration clause.

(b) Mr. Nelson may not be impartial because of the close nexus between him and his firm and Healey & Baillie, owner's counsel.

(c) The third arbitrator was disqualified because he was appointed by non-qualified panelists.

This challenge was denied by the arbitrators, and appellee in the meantime sought an Order compelling Transworld to proceed to arbitration. Transworld opposed the motion and sought to have the Panel dissolved on the ground that it lacked the requisite qualifications.

The Court on June 16, 1976, entered its Order granting appellee's motion and denying the right of appellant to challenge the Arbitration Panel. Believing that it will thus be deprived of fundamental rights of impartiality and due process in arbitration, Transworld filed this appeal from the Order so entered.

Point I

THE UNITED STATES DISTRICT COURTS POSSESS THE AUTHORITY AND JURISDICTION TO ADJUDICATE THE ISSUE OF THE QUALIFICATION OF AN ARBITRATOR PRIOR TO ARBITRATION AND TO REMOVE AN ARBITRATOR WHOM IT FINDS DISQUALIFIED

Appellant seeks to dissolve the arbitration because two of the three arbitrators are patently lacking in qualifications under the arbitration clause pursuant to which they were appointed.

Every arbitration requires, for the continued viable existence of this means of resolving disputes, strict impartiality of the arbitrators. In the instant matter Lloyd Nelson has a close nexus with the appellee's attorneys. His firm acts as agent for many vessel owners and operators which are represented by Fair Wind's counsel. In the absence of a clear statement to the contrary this fact raises serious question as to his partiality.

Furthermore, although Professor Sweeney is undeniably qualified as a legal scholar and maritime expert, it appears from his own disclosure before the Panel (22a, 23a) and his qualification letter to Judge Pierce (82a), dated December 13, 1973, that he is not a commercial man.

The opposition of Transworld at the outset was based upon its position that no arbitrable dispute existed. Thus the Court's Order should have first found that this position was incorrect, and should have granted Transworld the right to appoint its own arbitrator at that time. Instead, the Court ordered arbitration and at the same time, without a hearing on qualifications and without prior notice or opportunity to object, appointed Professor Sweeney.

This appointment was clearly outside the scope of the charter provision, but because of the procedure followed by the Court, Transworld was denied an opportunity then to object except by an appeal from that Order.

Transworld was thus put in the position where it could object to qualifications only at a full hearing, being forced to make that objection face to face with the arbitrators themselves.

In such a background, the impropriety of the present Order is clearly manifested. The effect of the prior Orders put Transworld into a dilemma which, as a result of this most recent Order, amounts to a total foreclosure of appellant's right to a fair hearing.

In this setting, San Carlo Opera Co. v. Conley, 72 F. Supp. 825 (S.D.N.Y., 1946), aff'd, 163 F. 2d 310 (2d Cir., 1947) has force and meaning. There the Court said, in persuasive dictum:

> "If the arbitrators have been appointed by the Court, and the question of disqualification of an arbitrator is raised before the arbitration has commenced, it appears the Court has the power to modify or change its original order by effecting a change of arbitrators for cause shown." 72 F. Supp. at 833

The Federal Courts do have the power to remove an arbitrator who lacks the requisite qualifications. This is true both in cases where the Court has made the appointment or where it was made by the parties.

In Julius Erving v. Virginia Squires Basketball Club, 349 F. Supp. 716 (E.D.N.Y., 1972), aff'd. 468 F. 2d 1064 (2nd Cir., 1972), the District Court was confronted with a situation wherein the contract between ("Dr. J") Erving, a most talented professional basketball player, and the Virginia Squires, a franchise in the American Basketball Association, provided that any dispute arising under the contract was to be arbitrated before the Commissioner of the "A.B.A.". At the time of the dispute the recently appointed commissioner of the league was an attorney still listed as a

partner of the law firm representing the Squires. Acknowledging the significant potential for partiality, the Court held that "arbitration should proceed before a neutral arbitrator" and ordered the replacement of the "contract-appointed" arbitrator. 349 F. Supp. at 719. The Order was affirmed on appeal in an opinion by Judge Medina for the Second Circuit, who wrote:

> "The claim that Judge Neaher had no power to direct the substitution of a neutral arbitrator for the disqualified commissioner of the American Basketball Association is typical of other attempts to emasculate arbitration procedures under the Federal Act." 468 F. 2d at 1067, 1068

The Erving case, it would therefore appear, goes even beyond San Carlo Opera Co. in extending the scope of authority of the Federal Courts to remove arbitrators. It deals not only with the dismissal of a court-appointed arbitrator, but with the removal by the Court of an arbitrator designated by both parties at the time they agreed to arbitration.

The Court's general equity jurisdiction may be properly invoked where it appears that an arbitrator is not qualified because of partiality or bias to prohibit such an arbitrator from continuing to so act. See also Astoria Medical Group v. Health Insurance Plan of Greater New York, 227 N.Y.S. 2d 401, 403, 11 N.Y. 2d 128, 131 (1962), Re Cross & Brown, 4 App. Div. 2d 501, 167 N.Y.S. 2d 573 (1957), and Gaer Bros. v. Mott, 130 Conn. 303, 309 (1957), (New York and Connecticut State Courts cases in which this motion of the broad equity power to remove an unqualified arbitrator is recognized).

In the United States Arbitration Act, 9 U.S.C. §1 et seq., Congress provided an avenue of redress for a party to an arbitration who believes itself to have been the victim of biased adjudicators. §10 authorizes the setting aside of an award where it was "procured by corruption, fraud, or undue means," 9 U. S. C. §10(a), or where there was evident partiality in the arbitrators, 9 U.S.C. §10(b). In these provisions Congress manifested its desire to provide not merely for arbitration but for impartial arbitration. Commonwealth Coating Corp. v. Continental Casualty Co., 393 U.S. 145, 147, 89 S.Ct. 337, 21 L. Ed. 2d 301 (1968). The Congressional intent is not merely for ultimate impartiality in arbitration, but impartiality from the outset of the process. The Court below held that because the act does not specifically provide for pre-hearing relief from partiality, none may be had. This is contrary to the interpretation of the Supreme Court.

As Justice Black concluded in Commonwealth Coating Corp. supra, "we cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration Boards that might reasonably be thought biased against one litigant and for another." 393 U.S. at 150.

Point II

APPELLANT TRANSWORLD SHALL BE DEPRIVED OF ITS FUNDAMENTAL RIGHTS OF IMPARTIAL ADJUDICATION AND DUE PROCESS IN ARBITRATION IF IT IS COMPELLED TO PROCEED, PRIOR TO AN ADJUDICATION AS TO THE QUALIFICATION AND COMPETENCY OF THE ARBITRATORS BEFORE A PANEL OF ARBITRATORS WHO APPELLANT HAS ALLEGED TO BE UNQUALIFIED TO HEAR AND DECIDE THE DISPUTE BETWEEN THE PARTIES.

In his endorsement order of June 16, 1975, Judge Pierce

further held that, even if the rule were as appellant has contended, in the circumstances of this case the arbitration had commenced and San Carlo Opera Co., supra, therefore, did not apply. To support this holding he cites the fact that the Panel had held one meeting and that appellant accepted the Panel at that meeting for the purpose of entertaining and deciding a motion for summary judgment (87a).

Appellant contends that in making its motion at the December 8th meeting it was seeking a pre-arbitration determination prior to the actual commencement of the arbitration proceeding. But, more importantly, appellant submits that the prolonged pursuit of this primarily semantic argument as to whether or not the arbitration had technically begun shall serve no purpose but to divert focus from the central and most fundamental issue involved in this appeal: Whether the Courts, charged with the duty of insuring fair and impartial arbitration proceedings, do not abdicate this responsibility by refusing to entertain petitions such as that made by Transworld herein.

Here, appellant has been relegated to seek a determination of qualifications from the persons whose qualifications are at issue, with no effective way of challenge if the Order of the Court below is not reversed. This situation effectively denies to Transworld what one Federal Judge has called "due arbitration process." See Rogers v. Schering Corporation, 165 F. Supp. 295, 301 (D.C.N.J., 1958).

To borrow the words of Justice Black in Commonwealth Coating Corp. v. Continental Casualty Co., supra, "at issue in this case is the question whether elementary requirements of impartiality

taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration." 393 U.S. at 145.

The assurance of proper appointment of the arbitrators in the first instance is of tremendous importance. Because of the extremely limited scope of review of arbitration awards, machinery that inhibits proper selection and appointment in the first instance can only enhance the possible denial to parties of their basic and fundamental rights. Cf., Aerojet - General Corp. v. American Arbitration Ass'n. 478 F. 2d 248 (9th Cir., 1973); Lucas v. Philco - Ford Corp., 399 F. Supp. 1184 (D.C. Pa.,1975).

Arbitrators are generally required to make a full disclosure of their relations, if any, to the parties or their counsel at the outset. The evident purpose is to permit the parties to object at that time to any lack of qualifications that may exist. Sanko S.S. Co. v. Cook Industries, Inc., 495 F. 2d 1260 (2d Cir., 1973).

Considered together, it is submitted, these factors disclose that the District court acted too hastily in summarily dismissing appellants challenge to the arbitrators.

Arbitration is not a strictly judicial process as it is not the state that is deciding the issue, but rather individuals selected by the parties by mutual agreement. The parties are motivated to agree to be bound by the determination of these individuals in the hope that they might attain an expeditious settlement of their dispute and at the same time, through use of informal proceedings, reduce the cost and delay frequently

encountered in the Courts. Yet, while resorting to this extra-judicial method for resolution of their controversies the parties do not cede the fundamental right to fairness in the decision-making process. Though the parties seek the "shirtsleeves" approach of arbitration over the black-robed formality of the Courts, they do not assent to an attendant relaxing of the standards of justice and impartiality they would expect at any level of the judicial system. The rule of arbitration rests precisely on the premise that any tribunal permitted by law to try cases and controversies must be unbiased and further must avoid even the appearance of bias. Appellant respectfully submits that "a fair trial in a fair tribunal," a tenet basic to the concept of due process, applies as strongly in arbitration as it does in the Courts. Cf., Withrow v. Larkin, 421 U.S. 41, 46 (1975).

If it is held that a party has no recourse to the District Courts on the issues of impartiality and competence of the Arbitration Panel until the panel has handed down its decision and award, the only assurance left to an objecting party that it shall be proceeding before fair and competent arbitrators is the personal integrity of the men sitting on the Panel; the only remedy available is the voluntary self-removal of a challenged arbitrator. Appellant suggests that it is expecting far too much of human nature to leave the preservation of the fundamental rights of due arbitration process to such an "honor system". In a case such as the one presently before this Court, wherein the arbitrators are to be paid for their services, there exists a basic pecuniary interest which cannot help but undermine such an unenforced "safeguard" as self-removal. Furthermore,

beyond this concern over an inherent financial self-interest, it is at best naive to expect a geniunely biased arbitrator to be in any way motivated to step down from his position on the Panel. Appellant respectfully submits that even the initial determination of the issue of the qualification of an Arbitration Panel cannot justifiably be left to the members themselves if due arbitration process is to be preserved.

Point III

APPELLANT HAS IN NO WAY WAIVED ITS RIGHT TO OBJECT TO THE MEMBERS OF THE PRESENTLY CONSTITUTED PANEL OF ARBITRATORS

The first meeting of the Arbitration Panel was convened on December 8, 1975. At the outset of that meeting, as the arbitrators proceeded with disclosure as to their backgrounds and qualifications, Mr. Harlow, appellant's attorney, specifically and particularly reserved appellant's approval of the arbitrators (25a, 28a). This meeting was the first occasion at which the qualifications of each member were disclosed in depth for appellant's consideration and therefore was the first and earliest opportunity for appellant to make proper and informal challenges to such qualifications.

Specifically with respect to Professor Sweeney, Mr. Harlow reserved approval on the ground that Professor Sweeney is not a "commercial man" (26a). Appellee has contended before the Court below that, by waiting until the first hearing to voice objection, appellant has somehow waived its right to challenge the Professor's competency to serve on the Panel. Appellant respectfully submits that, as there was no meeting of the parties with the Panel prior to the December 8th session, appellant made timely objection and

challenge at that meeting. It is of no avail to appellee, and no relevance to this issue, that a considerable length of time passed between the time of Professor Sweeney's appointment and the assertion of appellant's challenge to his qualifications, as the proper and accepted time for a party to formally voice its objection is at the beginning of the first assembly of the arbitrators with the parties, and it was precisely at that point of time that appellant so acted. Sanko S.S. Co., v. Cook Industries, Inc., supra. Furthermore, though Professor Sweeney did address a letter to Judge Pierce in December, 1973, listing the professor's experience in the field of maritime law (82a), it was not until the first meeting of the Panel that Mr. Harlow and Transworld were made aware of and given a copy of such letter. It was only at that time that appellant was fully apprised of Professor Sweeney's background; and appellant thereupon promptly reserved approval as to the Professor. This procedure accords with Court-approved methods for challenging the Panel. See Sanko S.S. Co. v. Cook Industries, Inc., 495 F.2d 1260 (2d Cir., 1975).

In alleging that appellant has waived its objection to the Panel, appellant in its memorandum of law to the United States District Court cited two main cases as precedent. Appellant respectfully submits that neither of the cases apply to the present situation. In both Ilios Shipping & Trading Co., S. A. v. American Anthracite & Bituminous Coal Corp., 148 F. Supp. 698 (S.D.N.Y., 1957), aff'd. 245 F. 2d 873 (2nd Cir., 1957) and Petrol Corp. v. Groupement D'Achat Des Carburants, 84 F. Supp. 446 (S.D.N.Y., 1949), the party raising its objection to the Panel in question failed to

voice the objection until after the Panel had rendered its award. In each case the objecting party proceeded with the arbitrations with knowledge of bias or incompetency of an arbitrator and only after the fact sought to have the issue of competency raised and the resulting award vacated. In contrast to these cases wherein the Courts held petitioner's silence prior to the award to constitute a waiver, appellant in this action has made timely objection before the arbitrators. It has not remained silent. Appellant therefore submits that the cases cited by appellee below are not in point and in no way support its claim of waiver.

Conclusion

Transworld respectfully submits that to compel it to proceed to arbitration before the presently-constituted Panel of arbitrators without a hearing on its challenge to the Panel would amount to deprivation of its rights to fairness and due process of law. Transworld further submits that the United States District Court possesses the power and authority to entertain appellant's motion for determination as to the issue of the arbitrator's qualifications before completion of the arbitration proceeding and the rendition of an award by the Panel. Its right to be so heard has not been waived.

The Order of the Court below should be reversed and the petition to compel Transworld to arbitrate before the presently-constituted panel of arbitrators dismissed. The members of this

Panel should be removed by the Trial Court and the parties to the arbitration instructed to appoint new arbitrators before proceeding with arbitration hearings.

Dated: August 27, 1976
New York, New York

Respectfully submitted,

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